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Office of Administrative Law Judges
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Issue Date: 28 April 2006

CASE NO.: 2005-LHC-01591

OWCP NO.: 14-139832

In the Matter of:

WILLIAM G. NEFF,
Claimant,

vs.

FOSS MARITIME CO.,
Self-Insured Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMEPSNATION PROGRAMS,
Party-in-Interest.

Appearances: Terri L. Herring-Puz, Esquire
For the Claimant

Russell A. Metz, Esquire
For the Employer

Matthew L. Vadnal, Esquire
For the Party-in-Interest

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND DENYING SECTION 8(f) RELIEF

INTRODUCTION

This is an action for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*., ("Longshore Act") filed by William G. Neff ("Claimant"), for a right pelvic fracture and shoulder injury that he suffered on May 14, 2003, while working for Foss Maritime Co. ("Employer") as a boilermaker rigger. It was initiated with the Office of Administrative Law Judges ("OALJ") on May 4, 2005, when it was referred to the OALJ for

formal hearing by the District Director of the Office of Workers' Compensation Programs. (ALJ 1.) For the reasons set forth below, the Claimant is awarded temporary and permanent total disability benefits, and the Employer is denied Section 8(f) relief.

PROCEDURAL BACKGROUND

This case was set as a part of calendar call before me in Seattle, Washington, on November 14, 2005. This matter was heard in Seattle, Washington, on November 14, 2005. The Claimant; his counsel, Terri L. Herring-Puz; the counsel for the Employer, Russell A. Metz; and an attorney for the Associate Regional Solicitor of the Department of Labor, Matthew L. Vadnal, all appeared and participated in the trial.

At trial, I admitted all the Claimant's Exhibits ("CX") and the Employer's Exhibits ("EX"), as well as five ALJ exhibits ("ALJ").

ANALYSIS AND FINDINGS

Issues

The following issues are pending in this case:

1. Whether the Employer has shown the existence of suitable alternative employment for the Claimant?
2. Whether the Employer is entitled to Section 8(f) relief?

Stipulations

At the beginning of the hearing, the parties stipulated to the following:

1. The Longshore and Harbor Workers' Compensation Act applies to this claim. (Hearing Transcript ("HT"), p. 9.)
2. The Claimant suffered an injury on May 14, 2003. (HT, p. 9.)
3. There was an employer-employee relationship between the Claimant and the Employer at the time of the injury. (HT, p. 10.)
4. The injury was work-related. (HT, p. 10.)
5. The claim was timely noticed and timely filed. (HT, p. 10.)
6. The Claimant reached maximum medical improvement on October 19, 2004. (HT, p. 10.)
7. The Claimant's average weekly wage at the time of his injury, as calculated under section 10(c), was $338.32.[1] (HT, p. 11.)
8. The Claimant was only employed part-time at the time of his injury. (HT, p. 11.)

I have reviewed the administrative record and find that the evidence of the record supports the Stipulations. Accordingly, I approve and find the Stipulations as stated.

[1] The Claimant earned $17,592.74 for his part-time work in the 2002 calendar year. (CX 2, p. 9.) Thus, under section 10(c) of the Longshore Act, his earnings are divided by 52 weeks in a year, to yield an average weekly wage of $338.32.

Additionally, I find that the Employer has paid temporary total disability benefits from May 15, 2003, to January 5, 2005; and the Employer filed a timely Notice of Controversion on February 7, 2005. (CX 1, pp. 4-7.)

Factual Background

The Claimant was born on February 15, 1932. (HT, p. 16.) He is right-hand dominant. (EX 3, p. 4.) He completed schooling up to the tenth grade and never obtained a general equivalency diploma ("GED"). (HT, p. 17.) However, he attained journeyman status as a plumber and steamfitter after completing a five-year apprenticeship. (EX 3, p. 4.) He retired from full-time work around October 1, 1995. (HT, p. 18.)

Before retiring, the Claimant worked in the building trades as a steamfitter for fifty years. (HT, p. 17.) As a steamfitter, he was a full-time employee, and worked continuously throughout the year, for eight or more hours a day. (HT, p. 18.) Because of his retirement, he receives Social Security benefits and retirement benefits from the Plumbers, Steamfitters, and Marine Fitters Local 290 in Portland, Oregon. (EX 3, p. 5.) About two years after he retired, he began working as a boilermaker rigger to earn extra money and to enjoy the camaraderie of working with others. (HT, p. 18.)

The Claimant joined the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, which dispatched him for work by notifying him of work opportunities through the phone and at the union hall. (HT, pp. 18-19.) Generally, the dispatches lasted for several weeks. (HT, pp. 19-20.) The union had no minimum work requirements and permitted members to decline offered dispatches. (HT, pp. 19-20.) The Claimant never turned down any dispatches, and when dispatched, he would work on the job until the project was completed. (HT, pp. 21-22.)

His job duties as a boilermaker rigger entailed fabricating, installing, and repairing rigging and weight-handling gear on ships; attaching hoists; and pulling rigging gears to lift, move, and position machinery, equipment, structural parts, and other heavy loads aboard ships. (HT, p. 20; EX 3, p. 5.) The boilermaker rigger job was classified in the "heavy" category under the Dictionary of Occupational Titles[2].

The Claimant did not work continuously throughout the year, but took time off to avoid the heat of the summer, to help his wife fix their home, and to travel. (HT, pp. 20-21.) He chose not to work throughout the year because of his retirement pension and Social Security income. (HT, p. 21.) In the year preceding his injury, he worked less than half a year as a boilermaker rigger. (HT, p. 22.)

1. **The Claimant's Latest Injury**

On May 14, 2003, two weeks after he accepted an assignment with the Employer, the Claimant was injured while ascending a ladder at the Employer's shipyard. (HT, p. 23; EX 6, p.

[2] http://www.oalj.dol.gov/libdot.htm

53.) He was working on a raft floating in the water and carrying a heavy chain block that was wrapped around his shoulder. (CX 8, p. 49; EX, p. 95.) As he was attempting to take down rigging that was underneath the vessel and move a three-ton chain fall to his shoulder, heavy winds suddenly moved the raft he was working on. (HT, p. 23; EX 3, p. 5; EX 6, p. 53.) The sideways movement of the raft caused him to fall off the ladder onto his right side. (HT, p. 23.) His feet were five feet above the ground before he landed with his hip and buttocks on top of another ladder. (CX 4, p. 13; CX 8, p. 49; EX 6, pp. 76, 85.) The chain block was still on his shoulder after he landed. (EX 6, p. 95.) He immediately began to experience pain in his hip and buttocks, and about a day afterwards, he began to feel pain in his right shoulder. (CX 8, p. 49; HT, p. 23.) He was able to walk after his fall, despite having sustained a right sacroiliac fracture in his pelvic region and a right rotator cuff tear near his shoulder. (CX 6, p. 43; EX 3, p. 4; EX 6, p. 95.)

After reporting the accident to the Employer, the Claimant was rushed to the Ballard location of the Swedish Medical Center in Seattle, Washington. (HT, pp. 23-24; EX 6, p. 95.) A radiologist examined him and found that his bones, joints, and surrounding tissue were "intact" and "normal." (CX 3, p. 11; EX 6, pp. 92, 105.) However, the radiologist identified "moderately advanced degenerative disease in the lower spine." (CX 3, p. 11; EX 6, p. 105.) He was discharged after being given pain medication for his injuries. (EX 6, p. 95.)

Because of continuing and persistent pain in his right hip and shoulder, the Claimant sought medical care with his family physician, Dr. Daniel Weakly, at the Edmonds location of the Swedish Medical Center on May 19, 2003. (CX 4, p. 13; EX 6, p. 76; HT, p. 24.) Dr. Weakly noted that the Claimant's right shoulder and right lumbar area had a limited range of motion that was "secondary to marked spasm and tenderness." (CX 4, p. 13; EX 6, p. 76.) The Claimant's pain was gradually worsening and he experienced sporadic "off and on" tingling in his right leg. (CX 4, p. 13; EX 6, p. 76.) Furthermore, Vicodin was not alleviating the pain. (CX 4, p. 13; EX 6, p. 76.) Dr. Weakly observed that he could not hyperextend or rotate, and was "limited to flexion at about 15 degrees, right and left bending [was] limited to 5 degrees." (CX 4, p. 13; EX 6, p. 76.) Furthermore, although his motor appeared intact, individual group testing caused him significant pain and could not be done. (CX 4, p. 13; EX 6, p. 76.) The Claimant suffered from a right shoulder, lumbar, and right hip strain. (CX 4, p. 13; EX 6, p. 76.) Dr. Weakly advised the Claimant not return to work for the next two weeks, prescribed pain medication, encouraged him to participate in physical therapy, recommended that he undergo magnetic resonance imaging (an "MRI") of his injured hip and shoulder, and referred him to Dr. Ralph Haller, an orthopedic surgeon, to have his shoulder further evaluated. (CX 4, p. 13; EX 6, pp. 76, 95; HT, pp. 25-26.)

The Claimant attended multiple physical therapy sessions from May 20, 2003, through June 17, 2003, and November 12, 2003, through January 13, 2004, but demonstrated only variable results. (EX 6, pp. 85-90.)

On May 28, 2003, Dr. Weakly reexamined the Claimant, and noted that although he suffered from a "pre-existing back problem," his recent shoulder injury was "specifically different," because he experienced "significant pain including over the right greater trochanter area" and "a marked decrease in range of motion of the right hip, as well as onto the lumbosacral

area." (CX 4, p. 14.) Dr. Weakly administered a cortisone injection with Xylocaine down to the greater trochanter area, and again recommended that the Claimant undergo an MRI of his hip and low back. (CX 4, p. 14.) At the time, the Claimant had not improved despite taking his medication and physical therapy. (CX 4, p. 14.)

On May 29, 2003, the Claimant had coronal T1 and short T1 inversion recovery ("STIR") images and axial T2 and proton density images taken of his hips. (CX 4, p. 16; EX 6, p. 68.) The images revealed that the Claimant sustained a "[r]ight hemipelvis fracture involving the superior and inferior public rami and right sacral ala, without discernable displacement" or evidence of femoral fractures. (CX 4, p. 16; EX 6, p. 68.)

On July 10, 2003, Dr. Weakly began to observe that the Claimant's pain had "significantly improved, 80-90%." (CX 4, p. 19; EX 6, p. 78.) However, the Claimant still suffered from a "clearly" decreased range of motion to his injured shoulder and symptoms "consistent with rotator cuff injury." (CX 4, p. 19; EX 6, p. 78.) The Claimant continued to see Dr. Weakly on a number of occasions, and Dr. Weakly continued to note the improvement in the Claimant's pelvic injury, and lack of improvement in his shoulder injury. (CX 4, pp. 13-37, 42.)

On July 22, 2003, the Claimant underwent an MRI of his right shoulder. (CX 4, p. 20; EX 6, p. 67.) The MRI image revealed that the Claimant's acromioclavicular joint was undergoing osteoarthritic changes with "inferior spurring." (CX 4, p. 20; EX 6, p. 67.) Furthermore, a heterogeneous signal from the MRI indicated that his distal supraspinous tendon was degrading and becoming attenuated from tearing and detachment. (CX 4, p. 20; EX 6, p. 67.) The MRI demonstrated that the Claimant suffered from a "full thickness rotator cuff tear at the level of the supraspinatus with detachment." (CX 4, p. 20; EX 6, p. 67.)

After an examination on August 7, 2003, Dr. Weakly observed that the Claimant was still experiencing "pain in his right hip," but his "hip pain is markedly better, and he has fairly good mobility." (CX 4, p. 21; EX 6, p. 79.) However, due to a limited range of motion and limited strength secondary to the pain, his left shoulder was "absolutely no better." (CX 4, p. 21; EX 6, p. 79.) Dr. Weakly estimated, "The patient is able to return to work on a very, very limited basis for sedentary work only, with the use of his right hand." (CX 4, p. 21; EX 6, p. 79.)

On September 4, 2003, Dr. Ralph Haller recommended surgery to treat the rotator cuff tear on the Claimant's right shoulder, because it had not improved for the preceding four months. (CX 5, pp. 39-40; EX 6, p. 53.) The Claimant underwent an open acromioplasty distal clavicle excision surgery on his right shoulder with Dr. Haller on September 16, 2003. (EX 6, p. 111; EX 3, p. 4.) In documents detailing the surgery, Dr. Haller noted that before surgery, the Claimant suffered from chronic shoulder pain that worsened after the rotator cuff tear to his right shoulder. (EX 6; p. 111.) During surgery, "the rotator cuff tear was not found, but an intrasubstance tear was found, and he underwent [an open] acromioplasty and reinforcement of the cuff. He has had a very difficult recovery period, and appears to have developed postoperative adhesions." (EX 6, p. 98.) Even after the surgery was completed, the Claimant still suffered from an "[i]mpingement with inter substance tear of the rotator cuff." (EX 6, p. 111.) Additionally, he was given an injection, but it did not alleviate his immediate pain. (EX 6, p. 95.)

Dr. Haller subsequently wrote on October 21, 2003, that the shoulder problem found at surgery is work related, at least in part. (CX 5, p. 41; EX 6, p. 113.) He opined that the Claimant had preexisting mild shoulder pathology, including possible small, asymptomatic bone spurs that rubbed against his torn rotator cuff. (CX 5, p. 41; EX 6, p. 113.) Thus, even though the area was surgically cleaned, the constant rubbing prevented healing and kept the tendon inflamed. (CX 5, p. 41; EX 6, p. 113.)

The surgery on the Claimant's injured shoulder ultimately exacerbated his pain and worsened his range of motion. (CX 7, p. 45; EX 6, p. 95.) He experienced pain when he raised his arm up to and above shoulder level. (CX 7, p. 45.) There was a significant cosmetic deformity of scar tissue from the surgery on the anterior aspect of his shoulder. (CX 7, p. 45; EX 6, p. 95.) However, he did not experience any numbness of distal tingling. (CX 7, p. 45.) His pain eventually lessened over time, but it continued. (CX 8, p. 49.)

During a subsequent examination with Dr. Weakly, the Claimant asked to be referred to another physician who could treat his continuing shoulder ailments. (CX 3, p. 34.) Dr. Weakly recommended Dr. Brian Cameron. (CX 3, p. 34.) Dr. Weakly noted that the Claimant's supraspinatus tendon was torn and that he continued to experience right hip pain, although his pelvic bone had healed. (CX 3, p. 34.)

Soon thereafter, Dr. Cameron examined the Claimant and recommended that he undergo surgery a second time. (HT, p. 26.) However, the Claimant did not follow Dr. Cameron's advice, because he did not want to repeat the pain and aggravation that he experienced from the first surgery, there was no guarantee that the second surgery would eliminate his pain, and the recovery from surgery would interfere with his life and his sleep pattern. (EX 6, p. 81; HT, p. 27.) The Claimant also declined further physical therapy, even though it could have improved his flexibility and increased his core strength. (CX 6, p. 44.) He did however participate in one course of physical therapy following his surgery. (EX 3, p. 4.)

Four months after the Claimant's surgery, on January 14, 2004, Dr. Weakly noted that the Claimant still experienced aching and had trouble regaining his motion in his left shoulder. (CX 5, p. 42.) Dr. Weakly observed that, "He lacks about 30 degrees of elevation despite vigorous physical therapy." (CX 5, p. 42.) Furthermore, he did not feel that he could return to employment as a boilermaker rigger, and there was no light duty work available for him. (CX 5, p. 42.) Even eight months after the surgery, on May 28, 2004, Dr. Weakly noted that the Claimant still experienced continuing pain, had a limited range of motion in his right shoulder, and was unable to lift his hand above his auxiliary area or to perform external rotations. (CX 4, p. 28; EX 6, p. 80.) The Claimant felt that his recovery from his surgery did not go well. (CX 4, p. 28; EX 6, p. 80.) Dr. Weakly recommended that he obtain a second opinion with another orthopedic surgeon with a new MRI. (CX 4, p. 28; EX 6, p. 80.)

The Claimant met with Dr. Paul Reiss, an orthopedic surgeon, for an independent medical examination on August 17, 2004. (EX 6, p. 91.) At the examination, the Claimant professed that he experienced aching in his right buttock and lower lumbar area, and pins-and-needles and focal numbness in the lateral right thigh. (EX 6, p. 95.) Additionally, there was a "focal area of stabbing in the posterior aspect of the right acromion." (EX 6, p. 95.) He could

not "raise his arm up beyond about 90 degrees." (EX 6, p. 95.) Although the pain was localized to his shoulder and buttocks, and did not radiate elsewhere, it kept him awake at night. (EX 6, p. 95.) The pain in his right buttock was closer to the top of his pelvis, but still in his posterior, and it intensified with activity, standing for prolonged periods, or sitting in an easy chair. (EX 6, p. 95.) Although he used crutches after the injury, he was not using a cane or crutches. (EX 6, p. 95.)

Dr. Reiss noted that although the Claimant's pelvic fracture may have further subjective symptoms, it is "healed," "fixed," "stable," had a range of motion within normal limits, and has reached maximum medical improvement. (EX 6, pp. 97, 99-100.) However, the range of motion in the Claimant's shoulder contusion and rotator cuff injury was "significantly restricted" with "firm endpoints" and had not reached maximal medical improvement. (EX 6, pp. 97, 98-100.) Dr. Reiss opined that the pelvic fracture was "related, on a more probable than not basis to the industrial injury of May 14, 2003." (EX 6, p. 98.) Additionally, the contusion on his right shoulder was also "on a more probable than not basis, related to his fall/industrial injury on May 14, 2004." (EX 6, p. 98.)

In addition to observing symptoms of the Claimant's injured right shoulder and hip, Dr. Reiss also documented other notable medical conditions. Dr. Reiss observed that the Claimant suffered from a history of changing vision and hearing loss from "buzzing" in his ear. (EX 6, p. 96.) Specifically, Dr. Reiss remarked that the Claimant is "somewhat hard of hearing, but can understand and respond to my questions." (EX 6, p. 96.)

On September 23, 2004, the Claimant underwent another MRI of his right shoulder. (CX 4, p. 32.) The radiologist who conducted the MRI concluded that he suffered from "probable decompression acromioplasty" and a "[f]ull-thickness 1-cm tear either of the posterior aspect of the supraspinatus tendon or a gap between the posterior aspect of the supraspinatus and anterior aspect of the infraspinatus." (CX 4, p. 32.) He also noted "[t]endinitis/tendinosis of the infraspinatus" and "[e]xtensive cystic changes at the cuff insertion." (CX 4, p. 32.) As for the rotator cuff, the radiologist indicated that the "full-thickness supraspinatus tear measuring about 9 mm in diameter" was "located about 13 mm from the insertion of the tendon onto the greater tuberosity, and [was] accompanied by an intersecting intrasubstance tear extending proximally." (CX 4, p. 32.) The radiologist also observed "diffuse thinning of the supraspinatus, especially anterolaterally," and suggested that it be inspected for further tears. (CX 4, p. 32.) The infraspinatus was swollen and "heterogeneous, with internal signal but no evidence of full-thickness tear." (CX 4, p. 32.)

On October 5, 2004, Dr. Cameron diagnosed the Claimant with a deltoid detachment. (CX 7, pp. 45, 47.) He surmised that the deltoid detachment was attributable to heavy overhead occupational activities following his surgery. (CX 7, pp. 46-47.) He opined "that the only clear way to alleviate his pain is to perform an open rotator cuff repair and open deltoid repair." (CX 7, pp. 46-47.) Dr. Cameron predicted that the Claimant's injured deltoid had a reasonable chance healing and recovery, but the Claimant was to cease any occupational lifting at and above shoulder level. (CX 7, pp. 46-47.) However, the Claimant was not interested in surgery, given that the recuperation time was estimated at four to six months. (CX 7, pp. 46-47.)

On October 19, 2004, Dr. Cameron again recommended that the Claimant undergo surgery. (CX 4, p. 35; EX 2, p. 2; EX 6, p. 81.) Although the Claimant was following an exercise program designed to maintain strength and the range of motion for his injured shoulder, he continued to demonstrate "marked difficulty with reaching over his shoulder with virtually any resistance." (EX 2, p. 2; EX 6, p. 81.) Dr. Cameron found that the Claimant suffered from a right shoulder strain, pelvic fracture, and stabilized hip strain. (EX 2, p. 2; EX 6, p. 81.) He noted that the Claimant was afraid to proceed with surgery because of the recovery time, improvement, thus "[h]e would, therefore, like to forego surgery, close the claim and accept his current condition. . . . Mr. Neff is content with closure of claim at this current level of wellness." (EX 2, p. 2; EX 6, p. 81.)

On October 19, 2004, Dr. Weakly set forth medical restrictions for the Claimant, limiting him from lifting more than 10 pounds with his right arm, more than 20 pounds with his left arm, and lifting his right arm above his shoulder level. (EX 3, p. 4.) The Claimant could work an eight-hour day within the lifting restrictions. (EX 3, p. 4.) He was also limited to "intermittent" sitting, walking, and lifting of four hours a workday. (CX 4, p. 36.) Given these restrictions, the parties agree that the Claimant cannot return to his former position as a boilermaker rigger.

On November 16, 2004, Dr. Weakly documented a change in the Claimant amenability to undergoing surgery. (CX 4, p. 37.) He noted that the Claimant "has thought about the overall situation, his lack of ability to perform actions he needs to with the shoulder" and "has decided that he would like to go ahead and have surgery to fix it." (CX 4, p. 37.) Dr. Weakly concurred, "[K]nowing his situation with exam, previous scans, etc., I endorsed that Mr. Neff should have the shoulder repaired surgically by Dr. Cameron." (CX 4, p. 37.) Meanwhile, the Claimant continued to experience pain. (CX 8, p. 49.) On May 2, 2005, Dr. Weakly noted that the Claimant had intermittent aching, sharp, and tender pain, focal around his right PSIS, which was worsened with sitting and walking. (CX 8, p. 49.) In 2005, the Claimant sought the treatment of Dr. Kathleen Burgess, the doctor recommended by Dr. Weakly for the symptoms arising from his right hip and shoulder. (HT, pp. 37-38.)

2. **Vocational Rehabilitation Examination and Labor Market Survey**

On April 8, 2005, Merrill A. Cohen, a vocational rehabilitation counselor and case manager, conducted a vocational evaluation and labor market survey based on the Claimant's occupational, medical, and educational history, and vocational test results. (EX 3, p. 7; HT, p. 41.) In the survey, she identified eight current job openings that she felt were consistent with his abilities and physical limitations. (HT, p. 41.) She considered a medical report by Dr. Weakly, dated October 19, 2004, that limited the Claimant from lifting 10-pounds with the right arm, 20-pounds with the left arm, and the right arm above shoulder level. (HT, p. 42.) Furthermore, she considered Dr. Weakly's opinion that the Claimant was able to work an eight-hour day within those lifting restrictions. (HT, p. 42.)

Ms. Cohen found unskilled, entry-level positions that were available between February 3, 2005, and April 6, 2005, including work as: 1) a driver, 2) a security guard, 3) a bench assembler doing light industrial assembly, 4) a parking attendant, and 5) a deburrer. (EX 3, p. 4; HT, p. 43.) These jobs were regularly available and had a wage range of $8 to $12 dollars an hour, which was equivalent to $7.61 to $11.41, in 2003 after factoring out inflation. (HT, pp. 43-44.)

Furthermore, she believed that the positions had physical demands consistent with the Claimant's medical restrictions and a high turnover rate, so the jobs were generally available. (HT, p. 45.)

The first driver position Ms. Cohen identified required frequent sitting, frequent lifting of less than ten pounds with either or both hands, and frequent reaching. (EX 4, pp. 10-11.) A legend on the labor market survey quantified "frequent" as being 31-70% of time. (EX 4, pp. 10-11.) Additionally, the minimum qualifications included the ability to obtain a Class B Commercial Driver's License.[3] (EX 4, pp. 10-11.) Similarly, the second driver opening required that the hiree have a valid Washington State commercial driver's license, or have the ability to obtain one within two months of hire. (EX 4, pp. 20, 22.) The physical requirements included occasional sitting, frequent lifting of less than 10-20 pounds, and frequent reaching. (EX 4, pp. 20, 22.) Unlike any of the other positions in the labor market survey, both driver openings were available as both full-time and part-time positions. (EX 4, pp. 10-11, 20, 22.) Ms. Cohen conceded that both of the driving positions required the Claimant to obtain a commercial driver's license within a specified period after being hired, and that if he could not obtain such a license, he would be terminated. (HT, p. 47.) One must successfully pass a Department of Transportation physical to acquire a commercial driver's license in the State of Washington. (HT, p. 47.) At the time of the trial, the Claimant had never worked as a driver and had not taken any physical or applied for a commercial driver's license. (HT, p. 47.)

The security officer openings were only available as full-time positions and they entailed a variety of relatively non-strenuous physical activities. (EX 4, pp. 15, 18, 29, 33.) The second security officer position required "minimum" qualifications of possessing valid driver's license and high school degree or GED. (EX 4, pp. 29, 33.) The position also required frequent walking and reaching. (EX 4, pp. 29, 33.) At trial, Ms. Cohen reviewed her vocational evaluation and labor market survey, and withdrew this position because the Claimant did not satisfy the high school education requirement. (HT, pp. 44-45.)

The job requirements for the remaining positions in the labor market survey were relatively comparable. Unlike the driver openings, the other positions were only available as full-time positions. The bench assembler positions were only available full-time, and required frequent lifting of tools and parts, and frequent reaching. (EX 4, pp. 24, 26, 30-31.) The second bench assembler position required frequent sitting, frequent lifting of light parts and tools, and frequent reaching. (EX 4, pp. 30-31.) The parking attendant opening was available only as a full-time position, and its physical requirements included frequent to occasional sitting and frequent reaching at or below the shoulder. (EX 4, pp. 14, 16.) Finally, the deburrer opening was only available full-time, and required frequent sitting, frequent lifting of parts and tools, and frequent reaching. (EX 4, pp. 35, 37.) The driving, a bench assembler, and deburrer positions required frequent sitting, between 31-70% of the day. (HT, pp. 47-48.) However, Dr. Weakly had limited the Claimant to intermittent sitting and walking for four hours a day, or roughly 50% of the day. (HT, pp. 48-49.)

[3] In the labor market survey, a Commercial Driver's License, Class B is abbreviated as "CDLB," part-time is abbreviated as "P/T," and full-time is abbreviated as "F/T." (EX 4, pp. 10-11.)

Currently, the Claimant engages in his own physical therapy and daily home exercise for his injuries. (HT, p. 27; EX 3, p. 5.) Although he does not take any prescription medication, he takes aspirin when needed. (EX 3, p. 5.) He stopped work immediately after his injury, and has not returned to work since. (HT, p. 28.) Furthermore, his symptoms from the injury continue to this day. (HT, pp. 28-29.) Pain makes it is difficult for him to stand straight, sit in hard-surfaced chairs, lie in one position, or to walk a long distance. (HT, p. 29.) Additionally, he encounters significant restriction and a limited range of motion in his right shoulder, such that he cannot raise his right arm above his shoulder level. (HT, p. 29; EX 3, at 5.)

Although the Claimant drives, he does not possess a commercial driver's license. (HT, p. 29.) Furthermore, his vision is limited because he had a cataract removed from his left eye around 2004, and at the time of trial, a cataract was rapidly developing in his right eye. (HT, p. 30.) Additionally, on October 29, 2001, he reported a long-standing, yearlong problem with a very busy visual field and sparkling lights, which physicians opined could be due to glaucoma or a retinal problem. (EX 6, p. 73.)

The Claimant did not apply for any of the jobs in the labor market survey, because he believed it "would be foolish" to commit to a year long job to make less wages than he would otherwise make in his previous part-time employment. (HT, p. 30.) Additionally, the jobs were uninteresting, did not pay well, and required significantly more of his time. (HT, p. 31.)

The Claimant was under the belief that the non-displaced fracture of his upper pelvis had not completely healed at the time of the hearing. (HT, p. 33.) However, no doctor imposed physical or medical restrictions on his ability to return to work based on that condition. (HT, p. 34.)

3. **The Claimant's Medical History**

The Claimant had preexisting medical problems before his right shoulder and right arm injury in 2003, including an industrially torn rotary cup in his left shoulder sustained shortly after his retirement. (HT, p. 35.) He received a $20,000 award for his torn rotary cup, but was not restricted from working, and did not suffer any permanent limitations from the injury after undergoing corrective surgery. (EX 3, p. 5; HT, p. 36.)

The Claimant also experienced chronic low back pain for many years, in addition to his recent pain since the injury. (HT, pp. 32, 36.) However, he was not undergoing medical treatment for any preexisting disability or impairment while working for the Employer, nor was he taking any medication, except for aspirin. (HT, pp. 36-37.)

In November 8, 1994, the Claimant was diagnosed with lumbar disc syndrome and early degenerative arthritis in his hips. (EX 6, p. 57.) At the time, his treating doctor opined that the pain was coming from his lower back and not his hip because the Claimant did not experience groin or anterior thigh pain and had a free range of motion of the hip without any discomfort. (EX 6, p. 57.)

The Claimant suffered a lower back sprain in March of 1997. (EX 6, pp. 64-65.) A nuclear medicine bone scan of the lumbosacral area of the Claimant's back on May 30, 1997,

was "normal." (EX 6, p. 64.) However, a few months later, on September 16, 1997, a computerized tomography scan of the Claimant's lumbar spine performed without dye illustrated that although there was "no herniation of the nucleus pulposis," there were "extensive degenerative changes of the L1-2 disc and L5-S1 disc" and "spinal stenosis between the L3-4 through L5-S1 levels" because of "hypertrophic changes of the posterior elements, posterior longitudinal ligament and bulging discs." (EX 6, pp. 65-66.)

On October 19, and 26, and November 9, 1998, a physician examined and reported on the effects, symptoms, and treatment of the Claimant's degenerative osteoarthritis in both feet. (EX 6, pp. 61-63.) Although the Claimant's elbows and shoulders were "satisfactory," "at times he [experienced] a lot of pain in his hips from arthritis." (EX 6, p. 63.)

On July 14, 1999, the Claimant was treated after complaining of low back and hip pain for the past one and a half weeks. (EX 6, p. 69.) At that time, the pain had been "going on for several years," although he was uncertain of "how long." (EX 6, p. 69.) However, he had "now reached the point where he can't sleep at night. [The pain] wakes him up several times a night." (EX 6, p. 69.) However, the medical report revealed that there was "[n]o real arthritis in the hip joints." (EX 6, p. 69.)

On July 16, 1999, a physician at the Edmonds Physical Therapy and Sports Rehabilitation Professional Center documented the Claimant's "long-term history of low back pain and right hip pain." (EX 6, p. 83.) "His right hip becomes more sore when lying on either his left or right side in bed." (EX 6, p. 83.) In addition to providing a detailed account of the Claimant's back pain, the physician also documented "numbness in the right later proximal hip, with soreness from that point to the front and medial aspect of the knee, with the pain continuing down to the ankle." (EX 6, p. 83.) In his structure and postural observation of the Claimant, he noted that the "hips are externally rotated, right greater than the left." (EX 6, p. 83.) As for the Claimant's passive movements, he remarked that although "[t]here was no pain with passive motion of the hip joints[,]" the hip external rotators are "markedly tight," and that the "hip flexors are tight." (EX 6, p. 83.)

On July 26, 2000, there was again medical documentation indicating that he complained of pain and tenderness in his right hip. (EX 6, p. 70.) Additionally, on April 17, 2001, he complained of low back pain. (EX 6, p. 71.) The Claimant was diagnosed with lumbar radiculopathy on October 19, 2001. (EX 6, p. 72.)

On November 6, 2001, the Claimant experienced right hip and leg pain, which "began many years ago," but worsened at that time. Although the pain radiated predominantly throughout his right hip, he also experienced pain in his thigh and leg. (EX 6, p 74.) An MRI demonstrated "moderate central canal stenosis at lumbar 4/5 and bilateral foraminal stenosis at L5-S1" and a non-anatomically significant bilateral lateral disc bulge at L3-4. (EX 6, p. 74.)

The Claimant also suffers from bilateral hearing loss, which requires him to use hearing aids, and makes it difficult for him to hear speech when there is background noise. (EX 3, at 5.)

Discussion

I. The Employer Has Not Satisfied Its Burden of Proving Suitable Alternative Employment

Once a claimant establishes that he is unable to do his usual work after an injury, he has established a *prima facie* case of total disability and the burden shifts to the employer to establish the availability of suitable alternative employment, which the claimant is capable of performing and which he could secure if he diligently tried. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *Hairston v. Todd Shipyard Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *New Orleans* ("*Gulfwide*") *Stevedores v. Turner*, 661 F.2d 1031, 1032 (5th Cir. 1981); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To satisfy this burden, the employer must show the existence of realistic job opportunities the claimant is capable of performing, considering his age, education, work experience, and physical and mental restrictions. *Gulfwide*, 661 F.2d at 1042-43. If the employer satisfies its burden, then the claimant may be found at most partially disabled. *See, e.g., Container Stevedoring Co. v. Director OWCP*, 935 F.2d 1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

The parties agree that the Claimant now cannot return to his pre-injury employment as a boilermaker rigger. Therefore, the burden is on the Employer to present realistic job opportunities for the Claimant, given his age, education, work experience, and physical and mental capacity. *Gulfwide*, 661 F.2d. at 1042-43. The Employer failed to satisfy this burden for several reasons.

A. The Claimant's Status as a Retiree Was Not Considered When Selecting Suitable Alternative Employment

First, Ms. Cohen, the vocational counselor, failed to identify part-time jobs with hours similar to the Claimant's post-retirement employment, and therefore, ignored the ramifications of his retirement.

1. The Benefits Review Board ("BRB") Recognizes that Retirement is Significant

Although retirement is generally by choice and not by health-related necessity, it is a once-in-a lifetime event that permanently alters one's pattern, ability, and desire to work. The BRB recognizes that retirement is significant, for the timing of retirement may determine the amount of a claimant's disability compensation. *See Morin v. Bath Iron Works Corp.*, 28 BRBS 205, 208 (1994) (holding that if a claimant voluntarily retires and is subsequently impaired by an occupational disease, his recovery for disability compensation is limited to an award of permanent partial disability based on the extent of his impairment under the *AMA Guides to the Evaluation of Permanent Impairment*, and not on economic factors. However, if a claimant involuntarily retires because of an injury, the post-retirement provisions within the Longshore Act are inapplicable, and the claimant is entitled to disability compensation based on lost wage-

earning capacity). Given the importance the BRB accords to retirement, if a claimant has retired, his retirement should be considered in finding suitable alternative employment.

The BRB has also considered retirement in conjunction with part-time employment. *Jones v. U.S. Steel Corp.,* 22 BRBS 229 (1989) involved a claimant who worked part-time after retiring. *Id*. at 230-232. At issue was whether the part-time retiree "retired" under 20 C.F.R. section 702.601(c), which defines retirement as the voluntary withdrawal from the workforce with no realistic expectation of return. Section 702.601(c) superseded a previous regulation that had defined retirement as "not being employed and having no earnings with no realistic expectation of returning to the workforce." 50 Fed. Reg. 384, 406 (January 3, 1985); *Jones*, 22 BRBS at 232. Based on the change of the wording in the regulations, the BRB held that the claimant in *Jones* had "retired" pursuant to Section 702.601(c), because he withdrew from the workforce and honestly had no expectation of returning, even though he later took on part-time work. *Jones*, 22 BRBS at 232. The change in the regulations reflected the drafters' intent to permit retirees to hold employment and yet remain "retired." *Id*. Therefore, the claimant's part-time position "did not constitute a return to the 'work force,' as contemplated by the regulation and thus did not revoke his retiree status." *Id.*

Here, it is undisputed that the Claimant retired; however, it is important to note that he is retired within the meaning of the regulations governing the Longshore Act. Similar to the claimant in *Jones*, although the Claimant was engaged in part-time employment, he retained his "retired" status.

2. Employment that Does Not Account for Retirement Is Not Suitable Alternative Employment

In *Devillier v. National Steel and Shipbuilding*, 10 BRBS 649, the BRB held that a Claimant who can achieve pre-injury earnings only by working overtime and "expending more time and effort," which he did not have to do before the injury, should be compensated. *Id*. at 658. The *Devillier* court reasoned, "overtime should not be included in assessing earning capacity if it has not been included in average weekly wage. If a claimant is earning more or the same only because he or she must now work overtime which was *unnecessary* in the pre-injury position, but his or her basic wage (as adjusted, if necessary) is lower than at the time of the injury, the overtime should be discounted." *Id*. (emphasis added). Similarly, the BRB has also recognized that "a job which is too physically demanding for the employee to perform or which entails *unnecessary* work does not constitute suitable alternative employment." *Stratton v. Weedon Engineering Co.*, 35 BRBS 1, 6 (2001) (emphasis added). Both *Devillier* and *Stratton* focus on the same logic, reasoning that "unnecessary" work should not be considered when calculating wage-earning capacity or when formulating suitable alternative employment. The BRB has also held that part-time employment may be the only suitable alternative employment. *Royce v. Elrich Construction Co.*, 17 BRBS 157, 159 (1985) (reasoning that although full-time employment may not appropriately accommodate to a claimant's physical limitations, if part-time employment is within the claimant's medical restrictions, it may constitute suitable alternative employment; furthermore, if the claimant is capable of performing part-time work, he is partially, rather than totally disabled.)

Although the legal standards for suitable alternative employment and wage earning capacity are different, the two inquiries are inherently interrelated, because where a claimant requests total disability benefits, the projected earnings from suitable alternative employment are treated as the claimant's wage earning capacity. 33 U.S.C. § 908(h); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984); *Menard v. Coastline, Inc*., 38 BRBS 95, 106 (ALJ) (2004). Therefore, the case law governing wage earning capacity provides insights into an inquiry regarding suitable alternative employment.

A reasonable wage-earning capacity is determined by certain variables, including, but not exclusive to those variables set forth in Section 8(h), such as the nature of the injury, the degree of physical impairment, and the claimant's "usual employment." 33 U.S.C. § 908(h); *Devillier*, 10 BRBS at 655-56. Although the variables under Section 8(h) are to be given "due regard," "any other factors or circumstances which may affect [a claimant's] capacity to earn wages in his disabled condition are to be considered." *Id*.

Although *Devillier* involved overtime work and not part-time work, the analysis in *Devillier* can be applied here, because the employers in both cases are trying to force the injured employee to work beyond his or her previous efforts and work hours. Applying the standards set forth in *Devillier*, I find that the full-time positions proposed by the Employer are not suitable for the Claimant, because he must unnecessarily expend greater effort by working longer and more frequent hours than his previous part-time job and receive less compensation. The Claimant's part-time work as a boilermaker rigger reflects the type and amount of work and he was capable of at the time of his injury. Thus, his part-time hours at that time reasonably represent his usual working capacity. Any hours in excess of his regular hours as a part-time worker are thus "unnecessary." Although the Claimant is medically able to work full-time, he should not be required to return to full-time employment as if he had never retired. The Claimant only worked part-time before his injury and had no interest in full-time employment after his retirement. His "usual employment" was part-time work.

Here, the parties calculated the Claimant's average weekly wage based on his part-time boilermaker rigger hours. Similar to the analysis in *Devillier*, if the parties use the Claimant's wages as a part-time employee to determine his amount of disability compensation, it is appropriate to extend the same reasoning and consider his part-time status when selecting alternative employment. The Employer cannot benefit from using the Claimant's part-time work when calculating disability benefits, and then avoid his part-time work when finding alternative employment. Therefore, employment positions must be part-time to be suitable alternatives.

State courts presiding over workers' compensation cases have also held that alternative work that would lead to a significant change in one's lifestyle is not suitable alternative employment. In *DePaul Medical Center v. Brickhouse* ("*Brickhouse*"), 18 Va.App. 506, 508 (1994), a case referenced in Larson's Workers' Compensation Law, an employee simultaneously worked a full-time job during the day and two lower-paying part-time jobs during the evening. *Id*. at 508. The employee was injured during his part-time work. *Id*. at 507. To satisfy its legal responsibilities, the employer offered him an alternative full-time position at the wages lower than his regular full-time position. *Id*. at 508. If the employee accepted the alternative work, he would be required to quit his preexisting full-time job, and work for lower wages. *Id*.

Accordingly, the employee refused. *Id*. The employer filed an application to terminate compensation, claiming that the employee unjustifiably refused suitable employment. *Id*.

The Virginia Court of Appeals reasoned, "It is neither logical nor just to expect the employee to give up a full-time, higher-paying job to take a part-time, lower-paying job, especially when the same circumstances have existed since prior to commencement of employment in the lower-paying job and prior to the injury." *Id*. at 508. After equitably balancing the employer's and employee's rights, the Court held that the employer's proposed employment must be limited to a specific timeframe, thus excluding the period which the employee was engaged in permanent, full-time employment. *Id*. The employer was required to factor in the Claimant's time constraints from his other two jobs, and therefore find alternative employment comparable in hours and timeframe to his previous part-time job. *Id*. In reaching its conclusion, the Virginia Court of Appeals focused on preserving the same circumstances that existed prior to his injury. *Id*. Therefore, under Virginia worker's compensation law, although the employee was physically capable of performing the proposed full-time work, his refusal of the employment was justified. *Id*. *Brickhouse* follows the analogous reasoning in the BRB decisions of *Devillier* and *Stratton*, by finding that suitable alternative employment cannot require a claimant to work "unnecessarily" beyond the hours or timeframe of his previous employment circumstances.

Here, none of the six full-time positions were suitable for the Claimant, because they did not respect his voluntary withdrawal from the labor market or his volitional choice to counterbalance his retirement with limited part-time work. Because the two security guard, two bench assembler, the parking attendant, and the deburrer openings were only available full-time positions, I find that none of the six full-time positions were suitable alternative employment, for they entailed unnecessary work that went beyond his previous part-time commitments.

B. **The Proposed Alternative Employment Exceeds the Claimant's Medical Limitations**

Second, the identified jobs are also incompatible with the Claimant's medical restrictions, for they violate his medical restrictions from lifting, sitting, or walking for 50% of the workday or more than four hours a day, and therefore would not allow the Claimant the flexibility to relieve his shoulder pain and heal his rotator cuff injury. The minimum requirements and general responsibilities of the driver, security guard, bench assembler, and deburrer positions required frequent lifting, sitting, or walking. "Frequent" activities required work for 31-70% of the workday.

1. Full-Time and Part-Time Driving Positions

Both proposed driver positions do not constitute suitable alternative employment. The first driving position required "frequent" sitting of up to 70% of the day, and thus exceeded the Claimant's medical restrictions of sitting for only four hours a day, or 50% of the workday. Although the second driving position only required "occasional" sitting of 11 to 30% of the day, it is counterintuitive and unbelievable that a driving position would only entail occasional sitting, when the minimum requirements and general job description on the labor market survey indicates that the primary job responsibility is to drive, and therefore to sit. (EX 4, pp. 20, 22.)

Consequently, neither of the driving positions constitutes suitable alternative employment, because they require the Claimant to sit for prolonged periods or the majority of the day, and therefore violate his medical restriction of intermittent sitting.

Additionally, it is unlikely that an employer would hire the Claimant as a driver given his advanced age and deteriorating hearing and vision. He exhibited hearing problems at the hearing, which I personally observed. (HT, pp. 16-38.) His difficulty hearing at trial revealed how pervasively hearing loss affected his life. (HT, pp. 16-38.) To obtain a commercial license, an applicant must pass a physical exam. Given that the Claimant sustained disabling injuries to his shoulder and hip, had impaired visual acuity from cataracts and possible glaucoma, and suffered from hearing loss, it is unlikely that he could successfully pass a commercial driver's license physical to qualify for a driving position. In totality, the Claimant is not medically or physically capable of the alternative employment as a driver, because of the combined effect of his age and his ongoing health problems, including poor vision and hearing loss.

Finally, although the driver positions were available as both part-time and full-time positions, the Employer did not specify what constitutes "part-time." If part-time work is defined as working three full days a week, then the Claimant would be required to sit up to 70% of the workday, thus exceeding his medical restrictions of intermittent sitting of up to four hours or 50% of the workday. Therefore, because the definition of part-time is unclear, the Employer did not satisfy its burden.

2. Remaining Full-Time Positions

In addition to the driver positions, the second bench assembler, the parking attendant, and the deburrer positions also entailed "frequent" sitting, and the second security guard position required "frequent" walking. Therefore, these positions similarly violated the Claimant's medical restrictions. Because Dr. Weakly expressly advised the Claimant against walking or sitting for more than four hours, the above jobs ran afoul of Dr. Weakly's medical recommendations by requiring sitting and walking activity up to 70% of the workday, or 5.6 hours, and therefore are not suitable alternative employment.

Additionally, because the counselor failed to consider the Claimant's limitations comprehensively, she compromised the results of the labor market surveys. At trial, she conceded that she originally proposed a security guard position as a viable position for the Claimant, but later withdrew the job at trial because the Claimant did not satisfy the minimum job requirement of having a high school diploma or GED. That she overlooked the basic data of Claimant's educational level indicates that she did not fully consider the Claimant's qualifications, or was at least careless in selecting the relevant openings in formulating her labor market survey.

In totality, because of the multiple shortcomings in the labor market survey and the weak testimony offered by the vocational rehabilitation counselor, I conclude that the Employer failed to satisfy its burden of proving the existence of suitable alternative employment. Of the eight job leads identified by Ms. Cohen, I find none suitable. The driver, security guard, bench assembler, parking attendant, and deburrer positions would require the Claimant to work beyond his physical and medical limitations. Therefore, based on medical restrictions alone, six of the eight

total jobs must be eliminated as unsuitable. Although the remaining second security guard and second bench assembler positions do not have job responsibilities that the Claimant cannot medically perform, they are full-time positions, and as discussed above, also are not suitable alternative employment. Accordingly, because the Claimant has established proof of total disability, he is therefore entitled to compensation benefits.

II. The Employer Is Not Entitled to Section 8(f) Special Relief

The purpose behind the Section 8(f) Special Relief Fund is to remove the disincentive for employers from employing individuals who suffer from a preexisting condition that could make them more susceptible to job-related injuries. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* ("*Carmines*"), 138 F.3d 134, 138 (4th Cir. 1998). Section 8(f) applies when an employee's work-related injury combines with a preexisting partial disability to cause a greater permanent disability than would have resulted from the work-related injury alone. *Id*. at 139. Under Section 8(f), an employer may limit its liability for payment of permanent disability to 104 weeks compensation by successfully making a three-part showing:

A) The injured employee had a preexisting permanent partial disability before the new injury or aggravation;

B) The injured employee's existing permanent partial disability was "manifest" to the employer before the new injury; and

C) The present permanent disability is either:

1) Total and not solely attributable to the new injury or the present permanent disability; or

2) Partial and materially and substantially greater than that which would have resulted from the new injury alone without the contribution of the preexisting permanent partial disability.

33 U.S.C. § 908(f); *Marine Power & Equipment v. Department of Labor* ("*Quan*"), 203 F.3d 664, 668 (9th Cir. 2000); *Carmines,* 138 F.3d at 138-39. The employer bears the burden of making the three-part showing and setting forth the facts necessary for 8(f) relief. *Quan*, 203 at 668.

A. Preexisting Permanent Disability

Under the three-prong analysis discussed above, the employer must first demonstrate that the claimant suffered from a permanent partial disability before his newest injury. 33 U.S.C. § 908(f). An employer can make such a showing by proving that the claimant has "such a serious physical disability . . . that a cautious employer would have been motivated to discharge the handicapped employee because of greatly increased risk of employment-related accident and compensation liability." *C & P Tel. Co. v. Director, OWCP* ("*Glover*"), 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977). A preexisting permanent disability must produce "some serious, lasting physical problem." *Bickham v. New Orleans Stevedoring Co.,* 18 BRBS 41, 42-

43 (1986); *Dove v. Southwest Marine of San Francisco*, 18 BRBS 139, 143 (1986); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 840 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

As early as 1994, the Claimant began suffering from low back and hip pain. (EX 6, p. 57.) That year, the Claimant began to experience pain in his hip and lower back, and was diagnosed with lumbar disc syndrome and degenerative arthritis in his hips. Further investigations into his continuing complaints revealed that he suffered from extensive degenerative changes in his lumbar spine, including bulging discs, spinal stenosis, and other significant hypertrophic changes. (EX 6, pp. 65-66.) These conditions caused or contributed to the Claimant's chronic back pain. (EX 6, pp. 65-66.) Additionally, the Claimant was plagued with arthritis, and was diagnosed with arthritis in his feet, and possibly arthritis in his hips. (EX 6, pp. 61-63.) The pain from his back affected him so profoundly, that he was unable to sleep at night or would often wake from the soreness and radiating pain. (EX 6, pp. 69, 83.) Subsequent medical examinations revealed that the Claimant suffered from a variety of spinal problems, including lumbar radiculopathy, a herniated disc, nerve root compression, and canal narrowing. (EX 6, p. 73.) The Claimant continued to suffer from hip and back pain through 2001. (EX 6, p. 74.)

Given the medical problems that systematically plagued the Claimant's low back, hip, and feet regions and led to prolonged medical treatment through the course of over seven years, I find that a cautious employer would be motivated to not employ him. The Claimant's arthritically weakened and sensitive joints and injured back pose a greatly increased risk of employment-related accident and compensation liability. Furthermore, the arthritis in his feet and hips, and his deteriorating, herniated, and bulging discs are serious and lasting afflictions, as evidenced by his repeated medical treatment for those ailments from 1994 to 2001. Therefore, I find that the Claimant suffered from a preexisting permanent disability before his latest injury with the Employer.

B. **Preexisting Disability Was Manifest**

Second, the employer must show that the claimant's existing permanent partial disability was manifest to the employer before the most recent injury. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1352 (9th Cir. 1993); *American Mut. Ins. Co. v. Jones*, 426 F.2d 1263, 1267-68 (D.C. Cir. 1970). A preexisting disability is "manifest," if an employer has: 1) actual knowledge of the disability, or 2) constructive knowledge of the disability from an existing medical record, which makes the disability objectively determinable. *Director, OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 456, 8 BRBS 498, 504 (CRT) (3d Cir. 1978); *Director, OWCP v. Todd Shipyards Corp.*, 16 BRBS 163, 167 (1984). A pre-existing condition "must be clearly diagnosed and identified in medical records available to the employer" to be "manifest." *Transbay Container Terminal v. U.S. Department of Labor*, 141 F.3d 907, 911 (9th Cir. 1998).

Here, there was comprehensive documentation of the Claimant's repeated hospital visits and ailments dating as early as 1994, for several different physicians detailed his treatment and diagnosis for lower back pain, foot arthritis, and hip pain. The diagnoses of each doctor were clearly set forth in their respective medical reports, and consequently, the Employer could have objectively determined the Claimant's disability from the ample medical record. From review of

the Employer's exhibits, it is also apparent that the medical records were available for the Employer to scrutinize in detail. Therefore, the second prong for relief under section 8(f) is satisfied. The Employer has established that the Claimant's prior condition was manifest.

C. Preexisting Disability Did Not Contribute to the Ultimate Disability

The third prong of the Section 8(f) relief test varies, depending on whether a claimant's injury is permanent partial or permanent total. Here, because the Claimant suffers from a permanent total disability, the Employer must show that the Claimant's injury is not solely attributable to the most recent injury or the present permanent disability. 33 U.S.C. § 908(f). The employer must provide substantive medical evidence showing that the claimant's second injury alone did not cause his current disability. *E. P. Paup Co. v. Director, Office of Workers' Compensation Programs*, 999 F.2d 1341, 1353 (9th Cir. 1993). If the second injury was enough to totally disable the claimant, and the evidence only shows that the latest injuries and preexisting disability caused greater total disability, then the employer has not satisfied its burden. *Id*.

In this case, the Claimant's injuries from the latest accident were themselves totally disabling. The Claimant sustained serious trauma and extensive pain from the latest accident, resulting in a right sacroiliac fracture, a right full-thickness rotator cuff tear at the supraspinatus tendon, strains in his right hip, right shoulder, and lumbar region, a right shoulder contusion, and a right deltoid detachment. (CX 6, p. 43; CX 7, pp. 45, 47; EX 3, p. 4; EX 6, pp. 95, 98.) The recent tear in his right shoulder was so serious, that he underwent an invasive surgical procedure to mitigate the pain and correct the injury, and was actively encouraged to undergo surgery for a second time. (EX 6, p. 111; EX 3, p. 4; HT, p. 26.) At the time of the latest medical report, the Claimant was still experiencing significant and debilitating pain in his right shoulder. (CX 8, p. 49.) However, before his latest injury, there was no evidence that he had ever injured or experienced pain in his right shoulder. Given the Employer's lack of evidence to the contrary, I find that the Claimant's serious ailments arising from the latest accident, including a torn shoulder tendon, detached muscle, and pelvic fracture, would have been entirely disabling on their own, even had the Claimant never suffered from preexisting arthritis and lumbar pain.

Also, the Employer failed to show how the Claimant's preexisting disabilities contributed to his new disability. At the time of the Claimant's most recent injury, evidence indicated that his preexisting disabilities were generally in remission, for they did not prevent or restrict him from performing heavy manual labor as a boilermaker rigger. (HT, pp. 36-37.) Additionally, the Claimant testified that his preexisting physical conditions did not result in any permanent work restrictions, ongoing medical treatment, or continuing medical problems. (HT, pp. 36-37.) Most significantly, the Employer introduced no medical opinions or evidence showing a relationship between the Claimant's preexisting disabilities and his current medical problems.

The Employer did note that the Claimant suffered from preexisting discomfort and pain in his hip. However, the Employer never drew an undisputed connection between the Claimant's prior back and hip ailments and his current injuries. The medical record revealed significant discord among the physicians who evaluated and treated the Claimant. One physician opined that the pain in the Claimant's hip originated from his lower back and not his hip. (EX 6, p. 57.) Another medical professional maintained that there was "no real" arthritis in the Claimant's hips.

(EX 6, p. 69.) Finally, Dr. Weakly, the Claimant's treating doctor, surmised that the Claimant's recent hip fracture was "specifically different" from his history of back pain. (CX 4, p. 14.) In addition, two different physicians also opined that the Claimant's disc irregularities were anatomically insignificant. (CX 4, p. 23; EX 6, p. 74.) In totality, the medical evidence the Employer introduced actually undermined, rather than bolstered its position that the Claimant's preexisting disabilities contributed to his ultimate disability. The Employer never reconciled the medical discord or unresolved ambiguities surrounding the source and severity of the Claimant's hip pain and disc abnormalities. Accordingly, I find that the Employer failed to satisfy its burden to prove entitlement to Section 8(f) relief.

Although the Employer was able to establish the first two elements necessary in finding entitlement to Special Fund relief, I find that it failed to establish the element of contribution. Therefore, I find that the Employer is not entitled to Section 8(f) relief because it failed to show that the Claimant's prior condition impacted or contributed to his current disability.

CONCLUSION

In conclusion, the Employer has failed to identify suitable alternative employment for the Claimant. Therefore, the Claimant is permanently totally disabled. Furthermore, the Employer is not entitled to Section 8(f) relief.

ORDER

Based on the findings and conclusions set forth above, it is hereby ORDERED that:

1. Foss Maritime shall make payments to the Claimant for temporary total disability benefits from May 14, 2003, through October 19, 2004, based on an average weekly wage of $ 338.32.

2. Foss Maritime shall make payments to the Claimant for permanent total disability benefits beginning October 20, 2004, based on an average weekly wage of $338.32.

3. Foss Maritime shall pay interest on any past due compensation payments as determined by the District Director.

4. Foss Maritime shall receive credit for any disability compensation benefits previously paid to the Claimant for this claim.

5. The District Director shall make all calculations necessary to carry out this Order.

6. Counsel for the Claimant shall prepare and serve an Initial Petition for Fees and Costs on the undersigned and on the Respondents' counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' counsel shall initiate a verbal discussion with the Claimant's

counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the Respondents' Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the Respondents' Counsel shall file and serve a Statement of Final Objections. Claimant's counsel may file a reply within 10 days after the objections are filed. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

7. The parties are ordered to notify this Office immediately upon the filing of an appeal.

A

JENNIFER GEE
Administrative Law Judge